

April 18. 1765.

ANSWERS

FOR

Poor Mrs ANN McDONALD, Relict of
John M^cKinnon of Missinib,

TO THE

PETITION of CHARLES M^cKINNON of M^cKinnon,
and his Tutor.

THE Defences in Law, formerly pleaded against the Respondent's Action and Claim are restated in the Petition; and it is further therein said, That the L. 150 paid by the Respondent's Brother to her Husband, as the consideration for her Liferent of the lands in question, was very inadequate to the value of that right, as the lands do yield about L. 38 Sterling of yearly rent; and therefore that the liferent-right must at any rate fall to be lessened in part.

Upon hearing the Petition, on the 2d of March 1765, your Lordships pronounced this Interlocutor: "The Lords having
" heard this Petition, refuse the same, in so far as concerns
" *Missinib's* power to grant the liferent-provision to the Pursuer; but ordain the Petition to be seen and answered with
" respect to the extent of the liferent-provision."

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By this Interlocutor, it is finally determined, That the Respondent's Husband had power to grant to her a ~~different~~ provision out of the estate : And the only question now to be considered is, Whether he committed an excess in what he did, so as to entitle the Petitioner to reduce the Respondent's right in part ?

The Respondent's Husband was a Son of the Laird of *M'Kinnon's*, and had a patrimony of 6000 merks ; and when the Respondent intermarried with him in 1718, her Father or eldest Brother gave her a portion of 2000 merks, which was suitable to her Husband's rank and estate, and for which she got the remuneratory provisions mentioned in the Petition, which were likewise suitable to her Husband's estate and situation in life ; but as he had no land estate, she got no other security for the implementing of them than her Husband's personal Obligation, and *Roderick M'Leod of Ullinsh* becoming bound as his Cautioner.

The Respondent's Husband succeeded to the estate of *M'Kinnon* in the year 1737, in the manner set forth in the Petition, an estate then worth between 3 and L. 400 of yearly rent ; and as by that Succession he came to be the head of a very considerable family in that part of the country, it was judged rational and proper, that the Respondent should have an additional ~~liferent~~ provision suitable to the estate, and her Husband's then rank in the world.

If the Respondent's relations had not been inclined, or in a condition to have given her any additional portion or fortune, it is nevertheless humbly thought, that the Respondent's Husband would have been bound in good conscience and in justice, to have given her an additional ~~liferent~~ provision under the circumstances he then stood, and that any such reasonable provision given by him would have been effectual in Law against the Petitioner, as it is now settled, both in this Cause, and in the question with *Sir James M'Donald*, that
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her Husband was Proprietor of the estate ; for Marriage itself is an onerous cause sufficient for supporting all reasonable provisions granted to Wives in every question with Creditors of whatever kind, as has been often adjudged by this Court.

The Respondent's relations did not demand the liferent provision given to her out of the estate to which her Husband had succeeded, merely as an act of justice, which they might have been entitled to have done, and which in some degree it was her Husband's interest to grant, as it might have been a question, Whether she would not have had right to a terrier notwithstanding of her Marriage contract? But her two Brothers, *Ronald M'Donald of Clornald*, and *Alexander M'Donald of Boisdale*, did agree to give a valuable consideration for the intended liferent provision ; and accordingly did pay to her Husband on that account L. 150 Sterling, upon which she was infeft in a liferent of a certain part of the estate lying in the island of Mull.

The Respondent, by various misfortunes that have attended her, has been deprived even of an opportunity of knowing the annual value or rent of the lands wherein she was infeft. The Petitioner says, they are presently worth about L. 38 Sterling ; but he has not, nor will not say, that they were worth so much when the Respondent's Husband granted the Liferent-disposition to her ; and that is certainly the period at which the rationality or irrationality, the equality or inequality of the transaction is to be tried ; for, if the lands had decreased in their value, the Respondent would have had no claim for the deficiency being made up to her ; and if they have increased, she ought to have the benefit, without allowing the increase to enter into the consideration of the equality or rationality of the Agreement.

When the Respondent married, her Husband was Lessee of the farm of *Elgnall*, part of the estate of *M'Kinnon* in the Isle of Sky ; but the Laird being desirous to have that farm, the

the Respondent's Husband gave it up in the year 1725, and in the year 1729, got in place thereof a liferent-lease of the estate of *Missinib* at a rent of 650 merks; which was proved in the cause with Sir James M'Donald, and where it was supposed that the estate of *Missinib*, when he made the purchase of the lands of *Sraib*, had only increased in its value L. 100 Scots.

The Respondent's liferent-right comprehends only about one-fourth of the estate of *Missinib*; so that there is no probability that her liferent-lands could have been worth L. 38 when her right was constituted. And indeed, there is a clause in the Bond granted by her Husband, which pretty clearly shows, that they could not have been worth so much; for the eldest Son and Heir of the marriage is by it intitled to take the locality-lands in the event of his marrying and settling during the Respondent's life, upon paying her 500 merks yearly, or giving her an equivalent locality.

During the Respondent's marriage, her Husband acquired a Wadset-right in security of his provision of 6000 merks, upon the lands contained in his liferent-tack; and they, by a frugal management, had not only the 6000 merks, but a very considerable moveable estate, when he succeeded to the estate of *M'Kinnon*. All which was expended in the improving of the estate, and in paying off the debts of the family.

The Petitioner, by recovering a Decree against the Respondent's Husband, for having the estate restored to him, came to have considerable claims against the Respondent's Husband for bygone rents and other causes, which came to be settled by a Decree-arbitral, and thereby her Husband *inter alia* was decreed to renounce and discharge the Wadset-right, and soon thereafter he died bankrupt in the year 1759.

The Respondent not knowing of this Decree-arbitral, nor of her Husband's bankrupt circumstances, by reason of her having

having been separated from him for a great many years, did bring an Action against those whom she supposed to represent him, for implementing the provisions in her Marriage contract, and payment of 16 years of an alimentary provision of L. 16 Sterling, which had been agreed upon to be paid to her as her separation from her Husband; but she came soon to be informed of the Decree-arbitral and renunciation of the Wadset-right and of her Husband having died bankrupt, and of *Roderick McClellan of Ullinsh* having also died bankrupt; so that she could not have the least prospect of recovering any thing in consequence of that Action. And the Respondent neither has nor can have any thing, either to maintain her in her old age, or to discharge the debt she has contracted for her maintenance in time past, excepting what she shall recover in consequence of the present Action. The question then is, What she is to have in virtue of her liferent-investment?

The L. 38, said in the Petition to be about the rent of that part of the estate wherein the Respondent is invest in part, consists of L. 10 payable for a change-house, and of L. 5, 5 s. for a mill, which your Lordships know are subjects that are attended with considerable expence in the upholding. But supposing the rent was L. 38 clear, and that it had been so much when the transaction passed betwixt the Respondent's Husband and her Brothers; it is humbly imagined, that the transaction could neither have been considered as irrational nor the bargain unequal. Not that the Respondent means to say, that the L. 150 was truly worth a liferent to her of L. 38, in the event of her surviving her Husband; but what she maintains is, that when the payment of the L. 150 is added to the natural Obligation that lay upon her Husband, to provide her suitable to his Widow in the event of her becoming so, did make the Agreement highly onerous; which is all that is necessary to be maintained in the present case.

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At the same time, altho' the Respondent is not in a condition to say with precision what the value of the lands were in 1737. yet from what has already been suggested, your Lordships must be satisfied, that they were not worth near to L. 38. And as the onerousness of the Agreement or Contract, must be judged of as things stood in 1737; so the Respondent most humbly hopes, that your Lordships will have no difficulty of sustaining the disentitlement given to her for such onerous causes to its full extent, that she may pass the few remaining years she has to live without feeling the pinching poverty she has so long struggled with, and is so ill suited to her age, to her birth, and to the prospects in life she once had.

In Respect whereof, &c.

J. A. MONTGOMERY.

The L. 38. said in the Petition to be about the rent of that part of the estate wherein the Respondent is interested, consists of L. 1. 10 payable for a change-house, and of L. 5. 2. for a mill, which your Lordships know are subjects that are attended with considerable expense in the upholding. But supposing the rent was L. 38 clear, and that it had been so much when the transaction passed between the Respondent's Husband and her Brother; it is humbly imagined, that the transaction could not have been considered as irrational nor the bargain unequal. Not that the Respondent means to say, that the L. 150 was truly worth a tithe of her L. 38, in the event of her surviving her Husband; but that the maintenance is that which the payment of the L. 150 is added to the annual Obligation that lay upon her Husband, to provide her withal to his Widow in the event of her becoming so, did make the Agreement highly onerous, which is all that is necessary to be maintained in the present case.